Transportation reform:
Bill C-101

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TRANSPORTATION REFORM: BILL C-101

INTRODUCTION

On 20 June 1995, the Minister of Transport tabled Bill C-101, the *Canada Transportation Act*. The legislation is intended to modernize and streamline rail regulation, promote the formation of short-line railways, ensure that shippers continue to have access to competitive transportation services, eliminate unnecessary regulation in other modes of transport, and place greater emphasis on commercial decision-making in the transport sector.

The proposed Canada Transportation Act represents an important update of Canadian rail regulations. It would:

- replace the *National Transportation Act, 1987*, the *Passenger Ticket Act*, the *Government Railways Act*, and elements of the century-old *Railway Act*, and rename the National Transportation Agency the Canadian Transportation Agency;
- shift the focus from abandonment of underused rail lines toward the development of a healthy short-line industry;
- introduce a transparent, consistent regime focusing on the conveyance of track to short-line operators; and
- ensure that shippers continued to have access to competitive transportation services through provisions designed to improve the bargaining powers of shippers and oblige the railways to offer adequate and suitable accommodation for all traffic moving over their tracks.

The Canadian Transportation Agency would have more effective enforcement powers, including the ability to levy fines for non-compliance across all transportation modes.

The government is also moving to eliminate unnecessary regulation in all modes of transportation. The bill would eliminate restrictions on entry of new air carriers in the North. It would abolish provisions allowing for regulation of extra-provincial trucking and bus companies

and rely instead on the *Motor Vehicle Transport Act*, which delegates this responsibility to provincial governments. The bill would eliminate licensing and tariff regulation of marine resupply services in the North and transfer regulatory responsibility for commodity pipelines to the National Energy Board. The Agency would no longer review the acquisition of large transportation companies.

The proposed Act would require an assessment of the financial health of new entrants into the domestic and international air passenger market. Airlines would not be able to promise travel by selling tickets without first obtaining a licence; thus consumers would be protected from new operators who were financially unable to supply the travel services they promised.

Specific clauses of the bill are dealt with in the following parts of this paper.

PART I: ADMINISTRATION

(Clauses 1-55)

As noted above, the Agency would henceforth focus on its quasi-judicial and administrative roles. The membership of the Agency would differ from that under the 1987 Act in that there would be three full-time members (down from nine) and three part-time members. This is consistent with fiscal restraint and the future reduced role for the regulator.

An important aspect of Part I of the Act is contained in clause 27(2), dealing with the Agency's powers regarding an application from a shipper seeking redress for a claimed unfair rate or service by a carrier. Under this clause, the Agency might grant the whole or part of the application only if it was satisfied, in the circumstances of the particular case, that the applicant would suffer prejudice if the relief sought were not otherwise available.

New authority would also be given to the Agency to dismiss any application that was frivolous or vexatious. In addition, clause 34 would allow the Agency to require the party responsible for frivolous or vexatious proceedings to compensate another party that suffered resultant damages.

According to clause 48(1), on recommendation of the Minister of Transport and the Minister responsible for the Bureau of Competition Policy, the Governor in Council would be allowed to take action to counter an existing or imminent extraordinary disruption in the national transportation system other than a labour dispute. This provision would be used only when there was no other sufficient or appropriate remedy elsewhere in law. The primary purpose of this clause would be to allow the Governor in Council to order a "cooling off" action in order to stabilize the sector when national interests were threatened.

PART II: AIR TRANSPORTATION

(Clauses 56-87)

The air transportation sections would modify and expand on the changes introduced in 1987. For example, the Bill 101 would eliminate the residual regulatory requirements for obtaining a licence to serve the North (the "designated area" maintained in the 1987 Act) and would establish a uniform domestic licensing regime for all of Canada. This would include common entry requirements for all domestic licences, revised notice of exit provisions and retention of the review, on complaint, of unreasonable basic fares or fare increases on monopoly routes.

Few changes would be made to the international licensing regime. Proposed amendments would expedite the issuing of policy directives (clause 77) to the Agency and clarify the Agency's power to act extra-bilaterally subject to ministerial direction. The Agency would make licensing determinations in accordance with the bilateral agreements and ministerial directions rather than on public interest grounds.

PART III: RAILWAY TRANSPORTATION

(Clauses 88-158)

Division I: Interpretation and Application

(Clauses 88-90)

These clauses provide the legal interpretations of various words in Part III; and would incorporate the relevant definitions previously incorporated in the *Railway Act*.

Division II: Construction and Operation of Railways

(Claues 1-104)

This part of the bill would alter some features hitherto contained in the *Railway Act*. For example, all railways under federal jurisdiction would require a certificate of fitness either to construct or to operate a railway. Railways currently operating under federal jurisdiction would have one year from the date the new Act came into force to obtain such a certificate, The certificate of fitness would replace the existing scheme in the *Railway Act* which requires a company to obtain a certificate of public convenience and necessity in order to construct a railway or a certificate of fitness when it proposes to operate an existing line. Unlike the existing *Railway Act* provisions, the new certificate of fitness would not be tied to either letters patent or the jurisdiction of incorporation. The issuance of a certificate of fitness would be based solely on the railway's possession of adequate liability insurance.

Division III: Financial Transactions of Railway Companies

(Clauses 105-111)

The Current *Railway Act* provides for the registration of mortgages and equipment trust certificates (a financial instrument securing railway rolling stock) and sets out a special scheme for reorganizing an insolvent railway company. These provisions work to enhance the credit ratings of Canadian railways. U.S. railways enjoy similar legislative treatment. At present, the CTA maintains the *Railway Act* provisions.

Division IV: Rates, Tariffs, and Services

(Clauses 112-139)

Rates and Conditions of Service - Clause 113

Under this clause, a rate or condition of service established by the Agency would have to be commercially fair and reasonable.

Level of Services - Clauses 114 - 117

Level of service provisions, often referred to as "common carrier obligations" would be carried forward essentially unchanged from clauses 144 to 147 of the NTA, 1987. They set out the obligations of a railway to accept and carry traffic offered to it by a shipper. The provisions in the NTA, 1987 were, in turn, carried over from the *Railway Act*. It had been proposed that the provisions be removed so that shippers and the railways would be expected expected to rely on common law and final offer arbitration (clauses 159 to 169) to resolve disputes over level of service. There was, however, widespread opposition from shippers, who felt that removal of an obligation of a railway company to transport traffic would significantly increase the market power of the railways. As a result, the provisions have been retained.

Tariffs - Clauses 118-126

These clauses set out the requirements for railways to publish rates and passenger fares in a tariff and to charge only published rates and fares (unless a shipper and a railway entered into a confidential contract under clause 127). The tariff provisions would be carried forward from the NTA, 1987 and the *Railway Act* with minor changes.

The requirement that rates be compensatory, that is, be greater than the variable cost of moving the traffic (section 112, NTA, 1987) and the Agency's authority to investigate complaints of non-compensatory rates (section 113, NTA, 1987) would be eliminated. The requirement that rates be compensatory is redundant in a commercial environment and allegations of predatory pricing can be dealt with under the *Competition Act*.

Confidential Contracts - Clause 127

The NTA, 1987 first allowed railways and shippers to enter into confidential agreements for the transportation of goods. Confidential contracts have been widely used and most traffic now moves under such terms. The new Act would eliminate the requirements that a railway company file copies of contracts with the Agency and that summaries of contracts be published, and would thus remove an administrative burden from the railways.

both railways are under federal jurisdiction. All current running rights arrangements are voluntary.

Some shippers have strongly supported changes that would allow provincial short-line railways to apply for running rights over the lines of existing federal railways. Federal railways, fearing that such a provision would severely undermine their competitiveness, would be reluctant to transfer lines to provincial short-line railways. On balance, the government believes that the benefits from discouraging the transfer of lines (to a short line operator) outweigh the benefits of running rights for provincial short-lines. Therefore, no provision has been made to allow the Agency to order running rights for a provincial short line over a federal railway. A federal railroad would continue to be able to grant running rights to a provincial short-line railway as a normal commercial arrangement.

Division V: Transferring And Discontinuing Operation Of Railway Lines
(Clauses 140-146)

This clause of Bill C-101 deals with rail rationalization; that is, the ability of railways to streamline their operations through the abandonment of excess, under-utilized rail lines. The CTA is endeavouring to facilitate this process by relaxing the procedures for abandoning or conveying the line to another operator. The entire process would be commercially oriented and be managed by the current line owner or operator without direct reliance on regulation or government decision. For a more detailed explanation of this section refer to the Research Branch Background Paper *Railines: Current Conveyance and Abandonment Procedures and Replacement Proposals in Bill C-101* (BP-403).

Division VI: Transportation of Western Grain

(Clauses 147-155)

These clauses carry over necessary definitions from the *Budget Implementation Act.* (Bill C-76), which received Royal Assent on 22 July, 1995. The sections of that Act corresponding to Division VI of the CTA were proclaimed. These clauses describe the products and geographical areas to which rate limitation would apply, confirm the application of general rate and tariff provisions and the maximum rate scale. Clause 155 proposes a review of the efficiency of the grain transportation system in 1999.

PART IV: FINAL OFFER ARBITRATION (FOA)

(Clauses 159-169)

Final offer arbitration was introduced through the NTA,1987 to resolve disputes between a shipper and carrier over the rates charged a shipper or the terms and conditions attached to the specific traffic to which the rate applies. Though rarely used, such arbitration is one of the three shipper competitive access rights -- the other two being interswitching and CLRs.

Shippers using rail, air and northern marine resupply services, who cannot agree with a carrier on a rate, or with any of the conditions of the movement, may submit the matter in writing to the Agency for arbitration. The submission must include the final offer of the shipper, the final offer of the carrier, and an agreement by the shipper to ship the goods according to the arbitrator's decision and to pay half the arbitration fees, including any costs for services provided by the Agency (the carrier is responsible for the other half). An independent arbitrator, chosen by the two parties or chosen by the Agency from a list, selects the final offer of one of the two parties.

FOA would now be broadened to include northern marine resupply freight traffic, and operators of passenger and commuter railway services. The period before which the arbitrator must make a decision would be reduced from 90 days to 60.

PART V: TRANSPORTATION OF PERSONS WITH DISABILITIES

(Clauses 170-172)

Special provisions for dealing with transportation problems encountered by persons with disabilities were first introduced into the NTA,1987 by way of amendment in July 1988. In addition to the July 1988 amendment empowering the National Transportation Agency to regulate accessibility in areas under federal jurisdiction, a further amendment in August 1992 explicitly added access to persons with disabilities to the section 3 policy declaration.

The provisions brought in under the July 1988 amendment and carried forward into the proposed *Canada Transportation Act* include:

- the ability to regulate transportation services and facilities under federal jurisdiction, including personnel training and information communication;
- the ability to inquire into matters on complaint or application to determine any "undue obstacle" to mobility; and
- the ability of the Agency to order corrective action, including compensation where appropriate.

These then are the significant sections of Bill C-101. The proposed legislation is intended to simplify and update the overall legislative and regulatory framework for the Canadian transport industry.

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